In the brief facts it was stated that the respondent gave a negative reply to a question which asked whether she had made an application before. The prosecuting officer also stated that the son of the respondent was registered as a citizen on August 15, 1958 but which registration was cancelled or revoked. Beyond these nothing else was stated in the brief facts of the case.

According to the record of the magistrate the respondent is illiterate and the form was prepared on her behalf by somebody else.

It is elementary but nonetheless fundamental that when an accused pleads guilty to a charge the brief facts given by the prosecuting officer must reflect the true and essential elements in the charge.

In this case firstly, the question referred to in the brief facts seems to be different from the question specified in the charge, the answer to which is alleged to be false. Again, it is alleged in the charge that the citizenship of the son was subsequently "cancelled" although the word "diluchutkan" (meaning "deprived") is used in P2. It is not however stated anywhere under what provision of the Constitution the respondent's son was so deprived of his citizenship. Furthermore, if as the charge says, the certificate was cancelled under what provision was it cancelled? If the cancellation was purported to be made under Article 30 of the Constitution read with section 30 of the Interpretation and General Clauses Ordinance 1948 then it is a serious question of law to be decided whether the respondent's son was in fact ever a citizen. Therefore the answer "No" against the question specified in the charge would *prima facie* seem not to be necessarily legally incorrect.

Finally in this case the magistrate had also asked for clarification on a number of points relating to the charge which the prosecuting officer could not provide even after an adjournment. On this point I would urge all prosecuting officers to be conversant with the facts of their cases before these cases are brought to court so that they can assist the court in the disposal of these cases expeditiously with justice and without undue delay.

Apparently based on the unsatisfactory facts given by the prosecution the magistrate thereupon rejected the plea of the respondent and acquitted the respondent presumably purporting to act under section 173(g) of the Criminal Procedure Code (F.M.S. Cap. 6). In my view it is on this point that the appeal must succeed.

The facts leading to the rejection of the plea by the magistrate in this case are similar to those in *Public Prosecutor* v. *Mahmud*[1]. In that case without asking the respondent whether he admitted the brief facts the magistrate in his short grounds of judgment ruled that an offence under section 36(1) of the Road Traffic Ordinance, 1958 was not disclosed and thereupon acquitted the respondent. Similarly in the instant case the magistrate without asking the respondent whether she admitted the brief facts of the prosecution acquitted the respondent as he found that the facts did not disclose an offence.

In his judgment in *Public Prosecutor* v. *Mahmud, supra*, H. S. Ong, F.J. referred to the commentary by *Mallal* at page 270 of his Criminal Procedure (4th Edn.) on the Singapore section 172(g) which is in *pari materia* with section 183(g) of the Criminal Procedure Code (S.S. Cap. 21) and section 173(g) of the Criminal Procedure Code (F.M.S. Cap. 6). Ong, F.J. said at the end of his judgment "I am to add that without hearing evidence it is not open to the magistrate to acquit. There has been no trial and I therefore set aside the order of acquittal and direct that respondent be re-summoned to answer to the charge as framed."

Based on the foregoing the order of acquittal of the magistrate is hereby set aside and the prosecution be at liberty to re-summon the respondent or to reframe the charge as they may think fit.

Acquittal set aside.

CHIN MOI & ANOR. v. CHEW PEN HOCK

[O.C.J. (Syed Othman J.) September 26, 1975]
[Kuantan — Civil Suit No. 172 of 1973]

Family Law — Application for a declaration that first plaintiff is lawfully wedded wife and the second plaintiff is legitimate child of defendant for the purpose of applying for maintenance — Whether High Court has jurisdiction to make declaration — Proof of Chinese customary marriage — Ceremony — Married Women and Children (Maintenance) Ordinance, 1950, section 8 — Courts of Judicature Act, s. 24(a) — Specific Relief Act, s. 41.

The plaintiffs sought a declaration that the first plaintiff is the lawfully wedded wife of the defendant and that the second plaintiff is the legitimate child of the defendant for the purpose of applying for maintenance under the Married Women and Children (Maintenance) Ordinance, 1950.

Held: (1) the High Court has jurisdiction to determine the questions raised in the application and to make the declarations;

(2) on the facts there was a marriage ceremony in this case and therefore the court would make the declarations asked for.

Cases referred to:-

(1) *Then Kang Chu* v. *Tan Kim Hoe* (1926) S.S.L.R. 1.
(2) *De Gasquet James* v. *Mecklenburg Schwerin* (1914) P. 53 at p. 71.
(3) *Har-Shefi* v. *Har-Shefi* [1953] 1 All E.R. 783.
(4) *R.* v. *Ratnam* (1930) S.S.L.R. 218.
(5) *Choo Eng Choon* v. *Neo Chan Neo & Ors.* (1908) 12 S.S.L.R. 120.
(6) *Piers* v. *Piers* (1849) 2 H.L.C. 331; 9 E.R. 1118.
(7) *Morris* v. *Davies* (1837) 5 Ch. & Fin 163 at p. 265.
(8) *Mahadervan* v. *Mahadervan* [1962] 3 All E.R. 1108.

CIVIL SUIT.

S. Sivasubramaniam for the plaintiffs.

B. K. Ong for the defendant.

Syed Othman J.: In this action the plaintiffs seek a declaration that the first plaintiff is the lawful wedded wife of the defendant, and that the second plaintiff is the legitimate child of the defendant and the first plaintiff, for the purpose of applying for maintenance under the Married Women and Children (Maintenance) Ordinance, 1950.

The defendant contends that he was never married to the first plaintiff and that the second plaintiff is his illegitimate child. In the midst of hearing the defendant changed counsel. The succeeding counsel has now raised a point which the outgoing counsel did not consider necessary to raise. My opinion here is only on this point.

Mr. Ong, for the defendant, submits that by section 24(a) of the Courts of Judicature Act, the court has jurisdiction only when the marriage is in accordance with a written law and it has no jurisdiction to determine the validity of a marriage under customary law, which the present case is all about.

He also cites *Then Kang Chu* v. *Tan Kim Hoe*[1] which is referred to in *Mallal's* Supreme Court Practice at page 321 where a note under Order 25 Rule 5 of the R.S.C. reads:

"The High Court has no jurisdiction to entertain a suit for a declaration of the validity of marriage."

Taking out the relevant portion, section 24(a) of the Courts of Judicature Act reads:

"Without prejudice to the generality of section 23 the civil jurisdiction of every High Court shall include:

(a) jurisdiction under any written law relating to divorce and matrimonial matters."

I am afraid I do not share Mr. Ong's understanding of the provision. In my view what is intended by the provision, so far as it affects a matrimonial cause, *e.g.* marriage, is that the High Court has jurisdiction over whatever form of marriage if it is within the purview or requirements of a written law.

In *Then Kang Chu's* case the respondent applied to a magistrate under section 38 of the S.S. Minor Offences Ordinance (No. 96) for maintenance order against the appellant. The magistrate refused to grant the order on the ground that the respondent failed to prove that she was the wife of the appellant. She then commenced action in the Supreme Court for a declaration that she was the wife of the appellant and entitled to maintenance by him. The Acting Chief Justice declared that the respondent was a secondary wife of the appellant and entitled to maintenance and support. The appeal was brought on the ground that the court had no jurisdiction to entertain the suit. The Court of Appeal held that the Supreme Court had no jurisdiction to entertain a suit for a declaration of the validity of a marriage and no jurisdiction to entertain an application under section 38 of the Minor Offences Ordinance, except by way of appeal or revision. Brown J. at page 6 then said:

"I take it that a magistrate, when dealing with an application under section 38 of Ordinance No. 96, is obliged to inquire and decide whether the applicant is a wife or not, if the question is raised by the alleged husband; in fact an inquiry of this sort seems to have taken place in the case of the present plaintiff; — and if the Supreme Court had the power to grant maintenance it would also presumably have the power (simply for that one purpose) to decide the question of marriage."

From this I am of the view that the decision was that the Supreme Court had no original jurisdiction to decide the question of a marriage for the purpose of granting maintenance under the Minor Offences Ordinance as it was within the jurisdiction of the magistrate.

I am therefore inclined to think that that case was decided on its particular facts and the particular law prevailing at the time. In the context of the present case I shall have to consider the law which is now applicable, particularly the provisions of the Married Women and Children (Maintenance) Ordinance, 1950.

Deane J. in his judgment in the above case at page 13 referred to the observation by Sir Samuel Evans on Order 25 Rule 5 of the Rules of the Supreme Court in *De Gasquet James* v. *Mecklenburg Schwerin*[2] at page 71, as follows:

"... it is to be observed that the rule is not applicable to this court, as the Rules of the Supreme Court do not affect or govern proceedings in this Division (Probate); and in no Division of the Supreme Court, in any event, could such a rule give a right to petition so as to create a jurisdiction in the court which otherwise did not exist: *Barraclough* v. *Brown* [1897] A.C. 615."

The last part of the observation does not appear to have gained support from the Court of Appeal in England. I am grateful to En. Sivasubramanian for having referred me to *Har-Shefi* v. *Har-Shefi.*[3] In this case the parties were married in 1950 in Israel. The wife was resident in England and the husband both resident and domiciled in Israel. In 1951 the wife received a Jewish bill of divorcement from the court of Chief Rabbi in London. She then filed a petition for a declaration that her marriage had thereby been validly dissolved. The Court of Appeal reversing the decision of the High Court held that under R.S.C. Order 25 Rule 5 the court had jurisdiction to make a declaratory order even though no other relief was sought, and therefore, it had jurisdiction to entertain a petition which sought only a declaration that a foreign decree of divorce was valid.

On the principle of this case, in my view, the High Court here should have jurisdiction under Order 25 Rule 5 to make a declaration relating to a foreign marriage or divorce on an application by an affected party within jurisdiction, whether or not any relief is sought.

Further, section 41 of the Specific Relief Act, 1950 (Act 137) equivalent to section 42 of the Specific Relief Act, 1877 of India, provides: —

"Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so."

There are several authorities cited in the Indian Contract and Specific Relief Acts by *Pollock and Mulla* (8th edition) in reference to "persons entitled to any legal character or to any right". A portion of page 860 reads:

"A plaintiff may under this section sue for a declaration that the defendant is not his son or that the defendant is not his adopted son; and that he is the legitimate son of a deceased person or that he is the son of A and not of B, and a woman may sue for a declaration that she is not the wife of the defendant. Illustration (h) indicates that this is the law where an immediate right to property is in question, but in the above cases it has been held that it suffices that the status in question carries legal consequences."

The present case carries the legal consequence as to the entitlement of the plaintiffs to maintenance under the Married Women and Children (Maintenance) Ordinance, 1950. Section 41 of the Specific Relief Act appears to give the High Court here jurisdiction to make a declaration sought in this application. The Straits Settlement at the time of *Then Kang Chu's* case did not appear to have any legislation on specific relief.

In any event, section 8 of the Married Women and Children (Maintenance) Ordinance, 1950 reads:

"If in the opinion of the court the matter in question between the parties or any of them could be more conveniently dealt with by the High Court, the court may refuse to make an order and in such case there shall be no appeal from its decision.

Provided always that the High Court or a judge thereof shall have power, by order in any proceedings in the High Court relating to or comprising the same subject matter as the application refused as aforesaid or any part thereof, to direct the court to rehear or determine the same."

In the present case the plaintiffs at first applied for maintenance under section 3 of the Ordinance before the Magistrate's Court. When the application came before the court, the question of validity of the marriage between the first plaintiff and the defendant was raised. The learned magistrate considered that the question could be more conveniently dealt with by the High Court and refused to make any order. The section, to my reading, empowers the lower court (Sessions Court or a Court of a First Class Magistrate — see section 2) to determine the questions now raised here; but at the same time it clearly empowers the High Court to determine them on the lower court refusing to make an order if it is of the opinion in terms ot the provision. In the present application, the question of legitimacy of the second plaintiff is merely adjunct to the main question of validity of marriage between the first plaintiff and the defendant.

For the foregoing reasons, I am of the view that the High Court has jurisdiction to determine the questions raised in this application.

(Ruling made on November 23, 1974).

Leaving the question of jurisdiction, I come now to the evidence as adduced by the parties.

The plaintiff's evidence on the marriage may be summarised as follows. In 1965 she lived in Raub and the defendant in Mentakab. Defendant's sister introduced her to him. Not long after the defendant proposed. She accepted. The wedding day was fixed by the defendant's mother after arrangement with first plaintiff's parents. On December 20, 1965, the wedding day, the defendant came with the bridal car from Mentakab to her house in Raub. The car was decorated. It had a red ribbon. After tea they left for Mentakab. At the family house of the defendant they both prayed at the ancestral altar. After that they went out to have photos taken. (These were produced at the trial). One photo shows the first plaintiff in bridal gown and the defendant in a suit of western dress, which, in this country, is usual for a wedding. Another shows the couple in their wedding dress with young girls of their age lined up behind them. They returned to the house where there was a tea party. At noon they had the Yen Hin (Wedding Dinner). After the guests had left the couple served tea to the elders *i.e.* the defendant's mother, the elder brother of the defendant's father and the wife of the elder brother. On December 21 there was a reception at a youth club. On second or third day after the ceremony the first plaintiff asked the defendant to go to the marriage registry but he refused. The couple lived at the defendant's family house, 48 Main Street, Mentakab. A baby girl was born to them on September 18, 1966. In 1969 defendant after marrying a woman from Taiwan moved out of the house. First plaintiff continued to live in the house until 1973 when she left it.

PW2, who rented out the wedding gown to first plaintiff, says that she was at the wedding; she is married; at her own marriage she underwent the same ceremony as first plaintiff and defendant; from what she saw, she is of the opinion that there was a Chinese marriage.

PW3, the uncle of first plaintiff, says that he was present at the wedding, but he did not see the prayer at the altar or the tea ceremony; he was a guest; it was not necessary for a guest to be present at the altar and tea ceremony.

The defendant's version may be put briefly thus: In 1965 he visited his elder sister (PW2) at Raub. He went to a cinema. He saw first plaintiff. He whistled at her. She smiled. He invited her to see the pictures. She accepted. The show over they became friends and fell in love. The sister did not introduce him to her. He paid first plaintiff visits. Her parents encouraged him. He had sex with her many times. After 2 or 3 months first plaintiff told him that she was pregnant and asked him what he wanted to do. He said he would take her. First plaintiff wanted him to marry her. He consulted his mother. She objected to the marriage. She also objected to taking her into the house. But he still took her in. He took first plaintiff from Raub to Mentakab. The photos were taken in a photo studio in Mentakab. He hired the dress from the photographer. PW2 did not hire it. The child was born in hospital after an operation. He had trouble with first plaintiff over money. They quarrelled. She also quarrelled with the wife of the elder brother and his mother. Because of constant quarrels he left the house. He did not take her from Raub to Mentakab in a bridal car. There was no prayer at the family altar and no tea ceremony in the house. He merely took her to the house as a kept mistress.

The sister, PW2, in evidence says that she did not introduce defendant to the first plaintiff; she does not know of any ceremony being performed in the defendant's house; she does not know their relationship; she does not know whether they were husband and wife; during the school holidays, she went to the house in Mentakab, and saw first plaintiff and the defendant there.

DW3, the wife of the elder brother, says she too does not know of any ceremony at the house; first plaintiff did not serve her tea; there was no prayer at the altar; she first came to know first plaintiff in 1966 when defendant brought her into the house.

The question to determine is whether there was a marriage ceremony at the house.

The plaintiff's case is straight forward. The defendant with his party came to Raub and took her party to the family house on December 20, 1965 where the ceremony was held. The evidence is supported by PW2 and to some extent by PW3.

As to the defendant's case, in examination-in-chief he says that when first plaintiff asked him what he wanted to do about her pregnancy, he told her he would take her to the house and this he did. He says the same towards the end of his examination-in-chief. But in cross-examination he says first plaintiff and her party came of their own accord. At one stage in cross-examination, recounting his sexual relationship with first plaintiff, he says, "On one occasion it was in her house. This was before the marriage." On being asked why did he say "before the marriage", he replied what he meant was before taking her to the house. I am not convinced with his explanation. The statement was volunteered not as a result of any leading question. The impression I have is that his conscience does not allow his tongue to deny the true situation. I find that the defendant's two witnesses are somewhat reluctant in giving evidence. They say defendant, before the marriage, used to bring in first plaintiff to the house for the night but DW3 merely heard of this. Her evidence is hearsay. I find it difficult to believe their story that defendant would bring in women to the family house without objections from other members of the family, particularly the mother and the brother. There is nothing to show that the house is some sort of brothel or a 'cheap hotel'. Even if what they say is true, no explanation is offered why first plaintiff had been staying there for about 8 years. DW2 and DW3 also gave me the impression that they do not want to be involved in the whole affair. DW2, the sister, at the start answered to questions by saying "I do not know". DW3 does not appear to be willing to recount anything. At one stage in cross-examination she says that first plaintiff came to the house when she herself was pregnant with the first child; this would mean towards the end of 1965. But later she changed her statement by saying that this was when she was carrying her second child. None of the defence witnesses impress me as being very open with the court.

The photos too convince me that there must have been a wedding. I do not accept defendant's evidence that they were for the purpose of make-believe.

There is one thing more which does not impress me with the truth of the defence case. The defendant says that when first plaintiff told him about the pregnancy, he consulted his mother; the mother objected not only to a marriage but also to his taking her into the house; he still took her into the house in spite of her objections. The first plaintiff in her evidence says that at the ceremony she served the mother and the father's elder brother tea. This was supported by PW2. If in fact the mother and the elder brother were not at the ceremony and if in fact the mother had objected to the first plaintiff, the defendant should have called the two to give that evidence. The mother should be too willing to testify in view of her objection, according to defendant, to first plaintiff from the beginning. Since the two are not called, I can only infer that they would take no part in the proceedings by the defendant to bastardize his own child.

On these considerations, I accept the evidence of the plaintiffs' side that there was a marriage ceremony on December 20, 1965.

Mr. Au Ah Wah (taking the place of Mr. Ong), for the defence, has urged in effect that even if the evidence of the plaintiffs' side can be accepted, it is no proof that the ceremony first plaintiff underwent would have constituted a marriage according to Chinese custom. For this he relies upon *R.* v. *Ratnam*,[4] the seven widows' case, and two English authorities. I do not think I need concern myself with the English authorities cited because one deals with Russian Law and the other with foreign currencies.

I do not think *Ratnam's* case cited can be applied here. It was a criminal case where it was held in order to support a charge of enticing away a married woman under section 498 of the Penal Code, the marriage must be strictly proved and recourse cannot be had to presumption. In the case here, the dispute is between the parties to a marriage and the court is to determine whether or not there was a marriage on the evidence as adduced by the parties; and under certain circumstances the court will presume a marriage.

I am unable to trace the seven widows' case referred to by Mr. Au Ah Wah. But the six widows' case (*Choo Eng Choon* v. *Neo Chan Neo & Ors.*[5]), as far as it affects the present case, laid down the principle that even in polygamous unions the presumption of marriage is drawn from cohabitation. In the present case there is evidence of cohabitation from 1965 to 1969, and there is the further evidence that first plaintiff continued to live in defendant's family house until 1973.

Mr. Sivasubramanian, for the plaintiffs, has cited to me several authorities which show that the burden of impeaching a marriage lies upon the respondent.

In *Piers* v. *Piers*[6] the headnote read:

"The question of the validity of a marriage cannot be tried like any other question of fact which is independent of presumption, for the law will presume in favour of marriage."

Lord Campbell at page 1136 had this to say:

"My Lords, my opinion is, that a presumption of this sort, in favour of a marriage can only be negatived by disapproving every reasonable possibility. I do not mean to say that you must show the impossibility of any supposition which can be suggested to support the validity of the marriage; but you must shew that this is most highly improbable, and that it is not reasonably possible. Because, otherwise there is a tremendous responsibility cast upon you with regard to the status of the women and of the children. See the peril which you are encountering; because you may be deciding that a woman is a concubine, and that the children are bastards, upon a mere speculation, when in fact, it is too late, to shew that there was that in existence which would render the marriage valid, the woman the wife of the person to whom she was married, and the children legitimate."

Lord Cottenham L.C. cited with approval the words of Lord Lyndhurst in *Morris* v. *Davies*[7] at page 265.

"The presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive."

In a more recent authority cited, *Mahadervan* v. *Mahadervan*,[8] Sir Joselyn Simon P. at page 1167 said:

"In my view, where a ceremony of marriage is proved, followed by cohabitation as man and wife, a presumption is raised which cannot be rebutted by evidence which merely goes to show on a balance of probabilities that there was no valid marriage; it must be evidence which satisfies beyond reasonable doubt that there was no valid marriage. In other words, the presumption in favour of marriage in such circumstances is of the same weight as the presumption of innocence in criminal and matrimonial cases."

In the present case, the main issue to determine is whether there was a marriage ceremony. Since I accept the evidence for the plaintiffs the presumption arises that there was a marriage. The defendant has not produced any evidence to show positively that the ceremony was in fact no marriage ceremony. The stand the defendant takes is that there was no ceremony at all — not that the ceremony as shown in the evidence of the plaintiffs did not constitute a marriage. The effect of his stand is that if the ceremony as stated by first plaintiff was held, it was valid marriage.

As to the submission by the defence counsel that an expert should be called, I must say I do not see the necessity for his giving any evidence before me. As far as I am aware a Chinese marriage in this country is not conducted or solemnized by an expert in Chinese customary law. It is all a family matter. Everyone seems to know the part he or she is to play. If those taking part or those present are satisfied that everything which needs to be done has been done, the couple cohabit, produce children and are accepted by the community as husband and wife, then I would accept that they have been married according to custom.

I hereby make the declaration that the first plaintiff is the lawful wedded wife of the defendant and the second plaintiff is the legitimate child of the defendant.

In view of the arguments and many points of law which have been raised, I award costs to the plaintiffs on the higher scale.

Declaration granted.

Solicitors: *S. Sivasubramanian; Au Ah Wah & Co.*